

GOVERNMENT OF THE DISTRICT OF COLUMBIA
BOARD OF ZONING ADJUSTMENT



Application No. 13620 of Richard F. Geist and Michael S. Kuber, pursuant to Paragraph 8207.11 of the Zoning Regulations, for a variance from the use provisions (Section 3105) to use the basement of the subject premises as an antique shop (second hand dealer) in an R-5-B District at the premises 1420 - 15th Street, N.W., (Square 195, Lot 121).

HEARING DATE: September 30, 1981

DECISION DATE: November 4, 1981

FINDINGS OF FACT:

1. The subject property is located in an R-5-B District on the southwest corner of the intersection of 15th and P Streets, N.W.

2. The subject property is a corner lot, is rectangular in shape and has frontage of fifty feet along 15th Street and twenty feet along P Street.

3. The property is improved with a two-story and basement row dwelling with its entrance along 15th Street. There is a separate entrance to the basement.

4. North of the subject property across P Street along the west side of 15th Street are a number of vacant lots, a church and a parking lot located at the northwest corner of the intersection of 15th and P Streets directly across from the subject property. West and south of the subject property along P Street and the west side of 15th Street is a predominantly residential area with a mix of row dwellings, apartments, institutional uses, professional offices, and parking lots. Adjacent to the subject lot to the west and south are row dwellings. East of the subject lot across 15th Street at the southeast corner of 15th and P Streets is a paint store and parking lot. At the northeast corner of the intersection of 15th and P Streets is a tailor shop. Several types of commercial uses are located along P Street east of the subject property and along the east side of 15th Street north of P Street, including a car wash, auto repair shops, parking lots and structure, liquor store, printing shop and a food store. The area east of the subject lot south of P Street along the east side of 15th Street contains predominantly residential uses in addition to some institutional and offices uses.

5. The subject site is within an R-5-B District which extends along the west side of 15th Street as far north as U Street and to the south for one and a half blocks. The R-5-B District extends to the west within approximately ninety to 212 feet of 16th Street between Scott Circle and U Street. Directly east of the subject site is an area zoned C-M-3 extending north along 15th Street to approximately Q Street and easterly along P Street to 14th Street. South of the C-M-3 area along 15th Street east of the subject site is an area zoned R-5-D which extends south along 15th Street to Rhode Island Avenue between Scott Circle and 14th Street.

6. The applicants propose to live on the first two floors of the subject property and to use a portion of the basement as an antique shop. The business would be a one man operation as a second hand antique dealer specializing in the Victorian period. No employees would be hired and an answering machine would be used to take calls. Customers would be served by appointment within an eight hour day for five to six days per week.

7. The basement floor is approximately two feet below grade and has a separate entrance along 15th Street. The ceiling height is approximately nine feet. The basement contains windows on the 15th Street frontage.

8. No refinishing of furniture will occur on the premises. Anyone purchasing an item must provide their own means of transportation.

9. The first two floors of the subject property have been renovated for residential use and the interior and exterior has been restored to their original Victorian character. This included the purchasing of Victorian style chandeliers, windows and doors. While the basement has remained unimproved and lacking heating, bathroom, or kitchen facilities, work on the basement has included laying a concrete slab floor, repairing a stairway to the upper floors and installing a fireplace.

10. The subject property was purchased by the applicants in March, 1980. Prior to that time the building had been used as a tailor shop on all three floors from 1967 to 1975. Since 1975 the property has not been used. It was left in a deteriorating condition until the applicants began renovation about May, 1981. The last recorded Certificate of Occupancy No. B-96071, was issued for a first floor tailor shop on December 19, 1975. Use of the subject property prior to 1967 had also been as a tailor shop. Even though the prior Certificate of Occupancy referred to the first floor only, it is evident from the record that the entire premises, including two floors above grade and the basement, was formerly devoted to a non-conforming tailor shop.

11. Prior to purchasing the subject property, the applicants discussed by phone and in person their plans to use the basement of the subject property as an antique shop with representatives of the Zoning Review Branch of the Department of Housing and Community Development. The applicants stated that they were advised orally by representatives of the Zoning Review Branch that, since the subject premises had been previously used as a non-conforming tailor shop, the representatives did not foresee any difficulty in continuing a non-conforming use such as an antique shop. No written statement to that effect was given by a District Government official, nor was that determination made upon an application for a certificate of occupancy. After receiving the oral advice, the applicants acquired the subject property and began renovation of the structure. The applicants' contract to purchase the building and the subsequent sale of the property was in no way contingent upon zoning approval or the receiving of a certificate of occupancy. When the applicants finally applied for a certificate of occupancy for the antique shop, by letter dated September 5, 1980, the applicants then learned from the Zoning Review Branch that they would have to seek approval from the Board of Zoning Adjustment for the proposed use.

12. Also, based upon the verbal assurances of persons from the Zoning Review Branch, one of the applicants gave up his professional occupation to devote full time to operating the proposed antique shop. His occupancy as a radiologist would require re-certification which would be time consuming and expensive.

13. The applicants argued that the doctrine of equitable estoppel is applicable in this case. The applicants cited the elements of equitable estoppel as follows:

(1) That a party, acting in good faith, (2) on affirmative acts of a municipal corporation, (3) makes expensive and permanent improvements in reliance thereon, and (4) the equities strongly favor the party seeking to invoke the doctrine. Wieck v. District of Columbia Board of Zoning Adjustment, D.C. App. 383 A.2d 7 (1978).

The applicants argued that they meet all of the requirements to invoke the doctrine of equitable estoppel and they have acted in good faith regardless of whether verbal assurances made to them by Government officials had not been put in writing. In reliance upon the word of governmental officials, they allegedly made permanent and expensive improvements to the subject property.

14. A tailor shop with less than 2,500 square feet of gross floor area is a use first permitted in the C-1 District. An antique shop is first permitted in a C-2-A District. Nine hundred square feet of the basement area would be devoted to the antique shop. The proposed change in use from tailor shop to an antique shop, a less restrictive use, requires a use variance.

15. The subject site contains no parking. Fifteenth Street, O and P Streets west of 15th Street are under a residential parking program which restricts non-residents to two hour parking on weekdays.

16. John E. Span of City Life Builders, Inc. testified as a witness for the applicant that the cost of renovation of the basement for solely residential purposes would be approximately \$76,305 which includes waterproofing of exterior basement walls. Renovation cost in the District of Columbia is approximately \$70 to \$80 per square foot.

17. A second estimate on the cost of renovating the basement was obtained by the applicant from the Howard C Rodman Company, Inc. of Pikesville, Maryland. The Rodman Company estimated that finishing work on the interior would cost between \$50 to \$60 per square foot. A complete kitchen and bathroom would cost at least \$10,000 and a self-contained heating and air-conditioning system would cost at least \$7,500.

18. Henry Ferrand, a real estate broker, testified as a witness for the applicants. He stated that the basement of the subject premises could not be economically used for residential purposes because the rent which would have to be charged would be much higher than present rental levels even for a larger space. A larger space would bring approximately \$600 to \$900 per month in rent, while the subject property would need approximately \$1,500 per month to break even.

19. Tom Lodge, a resident of 1316 Vermont Avenue, N.W. testified in favor of the proposed application. Mr. Lodge stated he had no objection to the proposed antique shop and that it would not have a negative impact on the neighborhood. He also stated that the improvements made to the structure to return it to its original residential character were of high quality and of benefit to the community.

20. The proprietor of the Canal Company at 1612 14th Street, N.W. filed a letter of support of the proposed application stating that the proposed antique shop would provide a community service which does not now exist for Victorian furniture and furnishings.

21. There were petitions of record in support of the application signed by property owners, renters and owners of business establishments in the neighborhood.

22. Harriet B. Hubbard testified for the Dupont Circle Citizens Association in opposition to the proposed application. She stated that the applicants had not substantiated their request for a variance in that the improvements made to the structure had no bearing on the granting of a variance. She also stated that the applicant did not prove a hardship existed in the property and that there was no proof the structure could not be used for a use permitted in the R-5-B District.

23. Advisory Neighborhood Commission 2B, by report dated September 30, 1981 recommended denial of the proposed variance request. The ANC cited the Board's recent denial of similar variance requests at 1701 New Hampshire Avenue and 1621 - 21st Street, N.W. The ANC noted that nothing about the property is unique or unusual to create a hardship for the owners as evidenced by the high degree of exposure to light and air of the basement and that the unfinished nature of the basement is no impediment to its use as a residence. Further, the ANC cited the District of Columbia Court of Appeals decision in Gardner E. Palmer et al. v. Board of Zoning Adjustment (287 A.2d 535) in which the Court stated:

"To grant a variance when the conditions are not unique would result in similar demands from neighboring properties. Approval of such requests would in effect be amending the Zoning Regulations thereby undermining the function of the Zoning Commission whose task it is to make basic legislative judgments in drafting regulations."

The ANC further cited the Court's decision, as follows:

"The mere inability of the owner to put property to a more profitable use or loss of economic advantage does not constitute hardship."

24. The Office of Planning and Development, by report dated September 25, 1981, recommended denial of the application. The Office of Planning and Development believed that a showing of hardship had not been made as a requisite to granting a use variance. In the opinion of OPD, no such hardship exists where the floor area, headroom, access, light and air are clearly adequate for residential use. The problems associated with the subject property are common for row dwellings undergoing renovation in residential districts. The OPD further stated that any aspect of a commercial structure or use had been removed.

25. The applicants present no probative evidence that the basement of the subject premises could not be used for any use permitted in the C-1 District. Under Sub-section 7104.2, the previous tailor shop use could be changed, if approval was obtained from the Board as a special exception, to any other use permitted in a C-1 District. There are a large variety of retail and service uses permitted in the C-1 District, and other than merely stating that the basement would not be appropriate for a bank or bar, the applicants did not prove that C-1 uses could not be located in the building.

26. The applicants further argued that no use of the basement other than antique shop is possible because that is the only profession reasonably available to Michael Kuber, one of the applicants who intended to operate the business. Mr. Kuber further argued that the expense of renting space elsewhere for his business made it impossible to otherwise operate that business. Both of these arguments rely upon a hardship that is personal to Mr. Kuber and his business, and neither relates to a condition of this property.

27. Considering the element of estoppel, the Board find that the applicants did act in good faith. However, they did not rely on specific affirmative acts of the municipal corporation. Any reliance upon the oral comments of staff of the Zoning Review Branch cannot be construed as reliance upon an act of the Government. The Government acts by written approvals. In this matter, the only action taken in writing based upon a formal request for such action was the denial of the applicants' request for a certificate of occupancy.

28. The record is further unconvincing as to the extent of the "expensive and permanent improvements" to the property which were made on the basis of the oral comments. The testimony and evidence is clear that very little money was spent on work on the basement after the building was purchased. The vast majority of funds were spent for renovation of the upper two floors. General exterior renovations and expenses attributable to the entire building must be prorated more heavily toward the residential use. There is further no evidence in the record that the price paid for the property is out of line for other buildings in the area. Further, under questioning from the Board, the applicants' real estate witness testified that the property was not overpriced if it was to be used as an owner-occupied residence.

29. The Board finds that the equities do not "strongly favor the party seeking to invoke the doctrine." It is clear to the Board that the Zoning Regulations prohibit the use of the premises for an antique shop. Even assuming the non-conforming status of the tailor shop, Sub-section

7104.2 clearly requires BZA approval to change that use to another non-conforming use. Further, the applicants were clearly aware that the property was zoned R-5-B, and even a casual reading of the R-5-B use provisions makes clear that commercial uses are not usually permitted. The Board further notes that the applicants waited eleven months from the time they were notified of the need to receive BZA approval before they filed the subject application. The applicants argue that this too was on the advice of District zoning officials. The Board finds that the applicants did not diligently seek to follow up on the written ruling given by the Zoning Review Branch, and that the equities do not strongly favor the applicants.

30. As to the applicants' ability to use the property for a purpose permitted in the R-5-B District, the Board finds that the applicants' hardship is self-created. There is no evidence in the record that the property is materially different from surrounding rowhouses now used for R-5-B purposes. Further, the applicants' conversion of the upper two floors from tailor shop to dwelling unit demonstrates that such conforming use is practical. The applicants' willingness to accept a two or three year approval further demonstrates that the hardship is a result of temporary economic conditions related to the applicants' own personal finances. Such is not a proper basis for the granting of a variance, and does not support a finding that no reasonable use can be made of the premises for an R-5-B purpose.

CONCLUSIONS OF LAW AND OPINION:

Based on the record the Board concludes that the applicant is seeking a use variance, the granting of which requires proof that there is an exceptional or extraordinary condition or situation of the property which causes an undue hardship upon the owner. The Board concludes that there is no such hardship in the property. The applicants testified that the subject structure had been renovated for residential purposes on the interior of the upper two floors and on the exterior of the entire structure, thus, bringing most of the structure into compliance with the R-5-B District. The applicants also testified that they would suffer an economic hardship if the proposed variance is not granted based on the original purchase price and that residential use of the basement is not economically feasible because of the high rental which would have to be charged. The applicants' testimony on this issue conflicted with the applicants own real estate witness, who testified that the property could be used as a single family dwelling. The applicants further did not prove that the basement could not be used for a C-1 use as a special exception. The hardships alleged by the applicants are self-imposed and personal, and are not a proper basis for the granting of a use variance.

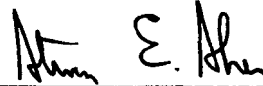
As to the argument of equitable estoppel as put forth by the applicants, the Board concludes that while the applicants may have acted in good faith, there is no evidence of an affirmative act on the part of the Zoning Regulations Division which would clearly establish the claims made by the applicants. The applicants did not expend substantial monies in renovating the basement, and the purchase price for the entire building is not out of line for its use as a dwelling. The Board concludes that the applicants have not clearly established that the equities strongly favor them.

The Board is required by statute to give "great weight" to the recommendation of the advisory neighborhood commission. The Board concurs with the recommendation of ANC 2B. The Board further concludes that the relief sought can not be granted without substantial detriment to the public good and without substantially impairing the intent purpose and integrity of the zone plan. Accordingly, it is ORDERED that the application is DENIED.

VOTE: 3-1 (Walter B. Lewis, Charles R. Norris and Connie Fortune to deny, Douglas J. Patton opposed, William F. McIntosh not present, not voting).

BY ORDER OF THE D.C. BOARD OF ZONING ADJUSTMENT

ATTESTED BY:


STEVEN E. SHER
Executive Director

FINAL DATE OF ORDER: MAY 20 1982

UNDER SUB-SECTION 8204.3 OF THE ZONING REGULATIONS, "NO DECISION OR ORDER OF THE BOARD SHALL TAKE EFFECT UNTIL TEN DAYS AFTER HAVING BECOME FINAL PURSUANT TO THE SUPPLEMENTAL RULES OF PRACTICE AND PROCEDURE BEFORE THE BOARD OF ZONING ADJUSTMENT."